UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO And UNION INTERNACIONAL DE TRABAJADORES DE LA INDUSTRIA DE AUTOMOVILES, AEROESPACIO E IMPLEMENTOS AGRICOLAS, U.A.W., LOCAL 1850	Cases: 12-CA-218502; 12-CA-232704

RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

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PRELIMINARY STATEMENT

Respondent urges the Board to overrule the ALJD concluding that AEELA violated Section 8(a)(5) and (1). For the reasons stated herein, the Board must overrule the ALJD decision which incorrectly applied purported past practice instead of reviewing the plain language of the contract and the meaning of Article 41; reverse the ALJD application of the "clear and unmistakable waiver"; and in its place apply the contract coverage test as in MV Transportation, Inc., 368 NLRB No. 66 (2019).

STATEMENT OF THE CASE

This Reply Brief is submitted in response to Counsel for the General Counsel's Answering Brief (Answering Brief) in these cases. On November 6, 2019 the Administrative Law Judge, Sharon Levinson Steckler (ALJ) issued her Decision (ALJD). On December 4, 2019, Asociación de Empleados del Estado Libre Asociado de Puerto Rico (hereinafter referred to as AEELA or Respondent) filed Exceptions to the Decision of the Administrative Law Judge (Exceptions) and a Brief in Support of Exceptions (Supporting Brief). On January 14, Counsel for General Counsel (GC) filed the Answering Brief.[1]

I. THE ALJ'S RELIANCE UPON PAST PRACTICE IS MISPLACED

In arguing the ALJ's findings that Respondent violated Section 8(a)(l) and (5) should be upheld, GC rehashes several of the findings and conclusions made by the ALJ. Specifically, by maintaining that the ALJ correctly found that Respondent had created a well-established

[1] References to Stipulated Facts (Jt. Stip.), Joint Exhibits (Jt. Ex.) are followed in each instance by the page number, stipulation number or exhibit number. References to the ALJD are followed in each instance by the page and, where found, line numbers. References to the Supporting Brief will be cited as "S.Br." and to the Answering Brief as "A. Br.", followed by the appropriate page number.

past practice, because AEELA paid Christmas bonuses annually for at least 15 years, from 2002 through 2016, based on the formula specifically determined by the parties' collective-bargaining agreement. GC also asserts that the ALJ correctly found that unit employees "could expect" the Christmas bonus to be paid according to the formula established in the collective-bargaining agreement, not by the limit set the Commonwealth's law and that AEELA unilaterally reduced the Christmas bonus benefit in both 2017 and 2018 when it was obligated to maintain the status quo of the expired collective bargaining agreement, arguing that the status quo was to pay the same Christmas bonus benefit that AEELA paid on 2016. (A. Br. 18, lines 1-18)

As stated in our Brief, a past practice is not the act of continuously complying with express provisions of the CBA, nor can it create a term of the contract where the term sought to be established is contrary to a clear and unambiguous term of a written nature which was entered into at arm's length by the parties and was executed by both parties. Peabody Coal Company River King Pit 6 and United Mine Workers of America District 12, Local 1148, 1992 WL 12744888 (June 30, 1992). GC's Answering Brief fails to even address this point.

GC's Answering Brief also fails to address the fact that in this case there is no evidence of past practice, because there is no proof on the stipulated record that before 2017 there were previous instances where AEELA had to pay a Christmas Bonus in a particular year that was not specifically mentioned in Article 41 as having a modification. In other words, paying the modifications to the Christmas Bonus amount that the CBA explicitly provided for years 2002 to 2016 does not constitute "past practice", but rather compliance with the letter of the contract.

The truth remains that AEELA did not reduce the Christmas Bonus payment. Paying the

Christmas Bonus amount as provided by Law 148 was not unilaterally decided by AEELA, it is what the parties agreed to pursuant to the plain language of the contract, in the first sentence of Article 41. Since Article 41 does not contain a modification pertaining to 2017 for payment of the Christmas Bonus, Respondent paid the Christmas Bonus as mandated by the first sentence of said Article, which clearly states that it shall be paid as provided by Law No. 148 of June 30, 1969.

Consistent with the erroneous ALJD, the General Counsel's Answering Brief continues to simply ignore that the last collective bargaining agreement signed by the parties, valid from July 1, 2013 to June 30, 2017, contains in its first sentence the following language; **" The Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended with the following modifications:"** The modifications expressed are for specific years until 2016. When Christmas 2017 arrived, there was no new CBA, thus, pursuant to the language contained in the first sentence of Article 41, on December 15, 2017, AEELA paid a Christmas bonus to eligible bargaining unit employees up to the maximum amount of $600 per employee, as stated in the first sentence of Article 41.

II. GENERAL COUNSEL'S ATTEMPT TO ARGUE ON INTENT REGARDING THE MEANING OF THE FIRST SENTENCE OF ARTICLE 41 MUST BE DISREGARDED

GC's Answering Brief contains a supple argument that tries to undermine the language in the first sentence of Article 41 of the contract, by implying that it merely mentions Puerto Rico's Law 148, but does not have any bearing on the formula to be used to calculate that bonus, because the contractual formula greatly exceeds the Law 148 formula. (A. Br. 21, lines 9-12).

This is an improper attempt by the GC to try to engage in an argument regarding the parties' intent, **when a glance at the stipulated record shows that there is not one iota of**

evidence regarding intent of the parties with regards to the meaning of the first sentence of Article 41. Unquestionably, it is the General Counsel who bears the burden of proof in establishing that AEELA's reading of Article 41 violated Section 8(a)(5) and (1) of the Act. However, the record shows that GC failed to introduce any evidence of the parties' discussions during negotiations of the meaning of said language (no notes taken by participants in said negotiations, no testimony on the meaning of the language, etcetera).

On this issue AEELA has never argued intent, but has always maintained, and must once again stress, as it did in its brief to the ALJ and in our Exceptions, 1) that there was no "modification" to the Christmas Bonus, and 2) that what AEELA has always asserted is that **there is a sound basis for AEELA's contract interpretation of Article 41**. The Board has repeatedly held that "where the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, it will not seek to determine which of two equally plausible contract interpretations is correct." Atwood & Morrill Co., 289 NLRB 794, 795 (1988). In NCR, 271 NLRB 1212, 1213 (1984) the Board held that when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not entertain the dispute to serve the function of arbitrator in determining which party's interpretation is correct.

This unfounded argument by GC is also illogical, because if such was the case and what the parties intended, then there was absolutely no point in placing the language of that first sentence in Article 41, given the fact that there is no dispute that Law 148 does not apply to employees represented by unions in collective bargaining agreements.

To argue their position, GC cites Ritchfield Hospitality, Inc. as Managing Agent for

Kahler Hotels, LLC, 368 NLRB No. 44 (2019). In Ritchfield Hospitality as in Wilkes-Barre General Hospital, 362 NLRB 1212 (2015), the collective -bargaining agreement did not address whether or not the employees were to continue receiving longevity pay increases after it expired. Because the parties' agreement did not indicate that the parties intended that the longevity pay increases would cease at the end of the contract, the Respondent's statutory duty to maintain the status quo required it to continue to pay the longevity increase after the contract extension expired. Citing Wilkes -Barre, 1216-1217 (2015). The case at hand is distinct from these cases because the expired collective -bargaining agreement clearly addresses in the first sentence of Article 41 that the amount to be paid is the one as provided by Law No. 148 of June 30, 1969. Thus, the status quo here was addressed in the Article 41 expired CBA.

III. THE ALJ INCORRECTLY REJECTED RESPONDENT'S CONTRACT COVERAGE WAIVER ANALYSIS.

The ALJ and GC conveniently rely on the clear and unmistakable waiver test, although this legal concept was recently rejected by the Board in MV Transportation, Inc. Amalgamated Transit Union Local #1637, AFL-CIO, CLC, 368 NLRB No. 66 (2019). In MV Transportation, the Board held that "the clear and unmistakable standard is, in practice, impossible to meet, since the application of the clear and unmistakable waiver standard typically results in a refusal to give effect to the plain terms of a collective-bargaining agreement, the Board in applying that standard effectively writes out the contract language the parties agreed to put into it". MV Transportation, Inc., *id*, at page 4. This is what the ALJ and GC are doing in the present case, refusing to accept the plain contractual language of the first sentence of Article 41 and write it out to their convenience. This is a severe error that the Board has to overturn by giving full effect to the plain meaning of Article 41. Under the

"contract coverage" or "covered by the contract" standard, the Board must examine the plain language of the parties' collective-bargaining agreement to determine whether the change made by the employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. If it was, the Board will honor the plain terms of the parties' agreement and the employer will not have violated the Act by making the change without bargaining. MV Transportation, Inc., *id*. In Metro. Edison Co. v. NLRB, 460 U.S. 693 (1983) and Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) recognize that the question of contractual coverage, one of contractual interpretation, is antecedent to the waiver question. See 460 U.S. at 706–10; 350 U.S. at 279 ("The answer turns upon the proper interpretation of the particular contract before us."). Curiously enough, the Board used to recognize this. See, e.g., Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 22 (1st Cir. 2007)

Pursuant to the above, it is imperative to uphold the plain meaning of Article 41, thus sustaining that AEELA did not act unilaterally, nor reduced, the Christmas bonus in 2017. To the contrary, AEELA acted as the expired CBA explicitly required and mandated. The expired CBA expressly stipulated that AEELA pay the amount as provided by Law No. 148 of June 30, 1969, and not the modifications that the contract language had assigned to particular years 2013,2014,2015 and 2016. The Supreme Court has cautioned that collective bargaining agreements, as with other contracts, must be interpreted by ordinary contract principles. See CNH Industrial, NV v. Reese, 583 U.S._ (2018); M&G Polymers USA, LLC v. Tackett, 574 U.S. _ (2015) at 7. Those principles reinforce AEELA's interpretation of the expired CBA.

IV. THE ALJ'S CONCLUSION THAT RESPONDENT HAD NO ARGUABLE BASIS FOR MODIFYING THE EXTENDED CONTRACT IN 2018 IS FLAWED.

Finally realizing that the first sentence of Article 41 is clearly an obstacle to the ALJD's flawed decision, in the Answering Brief GC tries to twist the plain language of Article 41 and support his faulty interpretation of Article 41. Now GC is straining to provide an alternate interpretation to Article 41 to fit its arguments. However, in order to do this, GC's contention would basically require a look at the parties' intent in drafting said language, which, as already set forth, is not supported by the record, because GC did not introduce any evidence of the parties' discussions during negotiations of the meaning of said language. The language of Article 41 is simple, and AEELA's interpretation of the contract is reasonable.

AEELA did not modify the Christmas bonus provision, to the contrary, Respondent fully complied with the plain language of Article 41. As the GC expresses, AEELA was well aware that the Christmas bonus of Article 41 was in effect and that is why it paid the $600.00 established in the first sentence of the provision. The fact is that AEELA knew that the contract provisions were applicable as being the status quo at the time, and therefore paid the amount up to a maximum of $600, as provided by Law No. 148 of June 30, 1969. This maximum of $600, as designated in the first sentence of Article 41, was paid for unspecified years, such as 2017 and 2018. Thus, the Christmas bonus payment was in no way intended to modify the extended contract in 2018. In this case, there are no conflicting interpretations of the Article 41. A clear and reasonable reading and understanding Article 41 as a whole resulted in AEELA's paying the amount up to a maximum of $600, as provided by Law No. 148 of June 30, 1969 for the non-specified years of 2017 and 2018.

In American Electric Power, 362 NLRB No. 92 (2015), the NLRB explained that where the dispute is solely one of contract interpretation and there is no evidence of anti-union animus, bad faith, or intent to undermine the union, it will not seek to determine which of two equally

plausible contract interpretations is correct. The NLRB overruled a previous decision in this case by an administrative law judge, who concluded that the company lacked a sound arguable basis for its interpretation and, therefore, it unlawfully modified the terms of the agreement. The NLRB found that the ALJ failed to analyze the evidence under the "sound arguable basis" standard and instead incorrectly applied the "clear and unmistakable waiver" standard, which is used for allegations of a unilateral change in working conditions under Section 8(a)(5). American Electric Power, *id*.

V. CASE AUTHORITY CITED BY ALJ TO REACH HER CONCLUSION IS DISTANT FROM THIS CASE

GC tries unsuccessfully to relate Wilkes-Barre General Hospital, 362 NLRB 1212 (2015) to the instant case by expressing that in both cases, the longevity-based increases (in Wilkes) and the Christmas bonus (in this case) are not tied to the term of the contract. (A. Br. 29, lines 13-20). In Wilkes-Barre, the plain language of the contract was in direct conflict with the employer's contention that longevity-based raises were somehow tied to the term of the agreement. In the present case, the Christmas bonus article contains a formula applied to the years specified and the maximum of $600, as designated in the first sentence of Article 41 for the unspecified years, such as 2017 and 2018. The contract provides the Christmas bonus payment for specified and non-specified years, as long as there is no other new CBA agreement in effect. Thus, in the present case the Christmas bonus is inevitably tied to the contract.

On the other hand, San Juan Bautista Medical Center, 356 NLRB 736 (2011) and Hospital San Carlos Borromeo, 355 NLRB 153 (2010) are very different from the case at hand.

In San Juan Bautista Medical Center, *Id*., the employer in said case simply refused to pay unit employees any Christmas bonus amount at all. Analogous to the case at hand, the contractual language in said case called for paying a Christmas bonus "according to the dispositions of Law 148". However, the employer requested exemption from the Puerto Rico Department of Labor (as provided by said law), and said Department granted the exemption only to "those employees that are not part of the bargaining unit".

Ironically, a rational analysis of the facts and holdings in San Juan Bautista Medical Center, *Id.*, leads to the inevitable conclusion that if the employer in said case had paid unit employees the Christmas Bonus amounts "according to the dispositions of Law 148", that is, up to a maximum of $600.00, there would have been no violation of Section 8(a)(5) and (1) of the Act. That is what AEELA did in this case, pursuant to the plain language of Article 41.

Hospital San Carlos Borromeo, *supra,* is also clearly different from the case at hand. There, the plain language of the contract "promised eligible employees a Christmas bonus up to a maximum of $810, depending on their salary". Hospital San Carlos Borromeo, *Id*., at page 1. As in San Juan Bautista Medical Center, the employer, without the Union's consent, reduced the maximum bonus to $370.00 based on a partial economic hardship exemption it obtained from the Puerto Rico Department of Labor. Pursuant to said clear contractual language, the Board concluded that "the contractual language on its face merely incorporated the statutory bonus as a component of a single Christmas bonus due unit employees under the contract". (Id., at page 1).

Evidently, different contractual language provides different results. It is clear from GC's and the Charging Party's arguments that they would have preferred that in this case Article 41 contained this same language ("The Bonus established herein includes and is not in addition to the one established by law"). In fact, what is stated in said language from the Hospital San Carlos

Borromeo case is exactly the interpretation that they wish the Board would adopt in this case. There is one big problem with that, the fact that said language does not exist in this case, and it is not for the Board to replace contractual language in order to grant the Union what it failed to obtain in the bargaining table.

CONCLUSION

The Answering Brief presents no compelling reason to reject the Exceptions and Supporting Brief. The Exceptions should be granted and the ALJ' s findings and conclusions should be reversed.

Dated at San Juan, Puerto Rico, this 28th day of January of 2020.

RESPECTFULLY SUBMITTED.

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CERTIFICATE OF SERVICE

The undersigned, as attorneys for Respondent, hereby certifies that a true and exact copy of the foregoing document was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the parties listed below via email to Atty. Manijee Ashrafi-Negroni, Sub-regional Office of the NLRB in Puerto Rico, to the email address Manijee.Ashrafi-Negroni@nlrb.gov; to Atty. Alexandra Sanchez ("charging party") to asanchez@msglawpr.com.

Dated at San Juan, Puerto Rico, this 28th day of January of 2020.

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